

Tektrix Sdn Bhd & Ors v Malayan Banking Bhd
(formerly known as Mayban Finance Bhd)

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HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–81 OF
2006

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VERNON ONG JC
7 APRIL 2008

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*Evidence — Documentary evidence — Computer printout — Certificate was not
produced — Whether admissible — Evidence Act 1950 s 90A*

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*Hire Purchase — Breach of agreement — Action to recover unpaid instalments
— Second hand goods — Goods merely described as a secondhand conveyerised
drying oven — Whether sufficient to identify goods — Whether good title passed*

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Pursuant to a hire purchase agreement ('the HP agreement') the respondent/plaintiff agreed to let and the first appellant/first defendant to take on hire a second hand conveyerised drying oven ('the goods'). By a guarantee of hire purchase agreement ('the guarantee'), the second, third, fourth, fifth and sixth defendants jointly and severally guaranteed the due and punctual payment of all sums due and payable under the HP agreement. The first defendant defaulted in payment and the plaintiff took action pursuant to the HP agreement and the guarantee. The goods were not repossessed by the plaintiff. The defendants counterclaimed against the plaintiff for the sum of RM106,741.78 being the deposits paid under a number of other hire-purchase agreements and the sum of RM5,530 being the instalments paid under the HP agreement. The learned sessions court judge allowed the plaintiff's claim and dismissed the defendants' counterclaim. The main grounds of the defendants' appeal were as follows: (i) the plaintiff failed to show that it could deliver good title to the goods and failed to ensure that the first defendant would enjoy quiet possession of the goods; (ii) the plaintiff was unable to identify the goods; (iii) the plaintiff failed to prove the amount due and outstanding under the HP agreement. Learned counsel for the defendants submitted that the learned trial judge erred in holding that the Sale of Goods Act 1957 ('SOGA') did not apply to the HP agreement. According to cl 7 of the HP agreement, the implied conditions and warranties relating to title and quiet possession were not excluded and should apply.

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A **Held**, dismissing the appeal with costs:

- (1) It was clear from the provisions of s 14 SOGA that the condition and warranty were only implied. In this instance the burden of proof was upon the appellants to prove these assertions, (see ss 101, 102 and 103 of the Evidence Act 1950). This the appellants had failed to do (see para 11).
- (2) There was no intervening event involving a third party which occurred which made it impossible for the respondent to pass a good title of the goods to the appellants. In the absence of any intervening event, it was not open to the appellants to contend that the burden of proof was upon the respondent to prove the condition and warranty, which was already implied by the SOGA (see para 14).
- (3) Upon an examination of the HP agreement in question, it was clear that the goods was described in the schedule as a second hand conveyerised drying oven. The first defendant had in fact acknowledged receipt of delivery of the goods by signing on the delivery receipt in the schedule. It was important to bear in mind that the goods in question was not new but second hand. Furthermore, the goods was not an item subjected to registration of title. The description of the goods in the schedule to the HP agreement was sufficient for the purposes of identifying the goods (see paras 16–18).
- (4) The computer generated document showing the amount due and outstanding was inadmissible because the certificate pursuant to s 90A of the Evidence Act 1950 was not tendered to the court. However the court noted the appellants' admission that they had stopped paying the instalments in July 1998. The respondent's witness, SP2, explained that the respondent was entitled to claim for the hire purchase price less the sums previously paid by the appellants under the HP agreement. This position was consistent with cl 12 of the HP agreement read together with cl 11. SP2's evidence on the amount of RM28,891.02 was also not challenged by the appellants in cross-examination (see para 19).

H **[Bahasa Malaysia summary]**

Berikutan satu perjanjian sewa beli responden/plaintif bersetuju untuk menyewakan dan perayu pertama/defendan pertama bersetuju menyewa satu 'conveyerised drying oven' yang pernah digunakan (barangan tersebut). Melalui satu jaminan kepada perjanjian sewa beli tersebut, defendan-defendan kedua, ketiga, keempat, kelima dan keenam secara bersesama dan berasingan menjamin pembayaran balik kesemua jumlah yang berhutang dan patut dibayar di bawah perjanjian sewa beli tersebut. Defendan pertama telah gagal membuat bayaran dan plaintiff mengambil

tindakan mengikut perjanjian sewa beli dan jaminan tersebut. Barangan tersebut tidak dimiliki semula oleh plaintif. Defendan-defendan menuntut balas terhadap plaintif untuk jumlah RM106,741.78 yang merupakan deposit-deposit yang telah dibayar di bawah beberapa perjanjian-perjanjian sewa beli yang lain dan jumlah RM5,530 yang merupakan instalmen yang dibayar di bawah perjanjian sewa beli tersebut. Hakim bijaksana mahkamah sesyen membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Alasan-alasan utama rayuan defendan adalah berikut: (i) plaintif gagal menunjukkan bahawa ia dapat memberikan hakmilik sempurna kepada barangan tersebut dan gagal memastikan bahawa defendan pertama akan dapat menikmati milikan sempurna barangan tersebut; (ii) plaintif tidak dapat mengenalpasti barangan tersebut; (iii) plaintif gagal membuktikan amaun yang berhutang dan patut dibayar di bawah perjanjian sewa beli tersebut. Peguamcara defendan-defendan berhujah bahawa hakim perbicaraan bijaksana telah terkhilaf dengan memutuskan bahawa Akta Jualan Barangan 1957 ('AJB') tidak terpakai kepada perjanjian sewa beli tersebut. Mengikut klausa 7 perjanjian sewa beli tersebut, syarat dan waranti tersirat berhubungan dengan hak milik dan kenikmatan aman tidak dikecualikan dan patut dipakai.

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Diputuskan, manolak rayuan dengan kos:

- (1) Ia adalah jelas daripada peruntukan-peruntukan s 14 AJB bahawa syarat dan waranti hanyalah tersirat. Dalam keadaan ini, beban bukti adalah pada perayu-perayu untuk membuktikan pengatahan-pengatahan ini (lihat ss 101, 102 dan 103 Akta Keterangan 1950). Ini perayu-perayu telah gagal membuktikan (lihat perenggan 11).
- (2) Tiada keadaan yang menghalang yang melibatkan pihak ketiga berlaku yang menjadikannya tidak mungkin untuk responden memberikan hakmilik yang sempurna barangan tersebut kepada perayu-perayu. Dengan ketiadaan keadaan yang menghalang, ia tidak terbuka kepada perayu-perayu untuk menegaskan bahawa beban bukti adalah pada responden untuk membuktikan syarat dan waranti yang telahpun tersirat oleh AJB (lihat perenggan 14).
- (3) Selepas mengkaji perjanjian sewa beli tersebut, ia adalah jelas bahawa barangan yang dinyatakan di dalam jadual sebagai 'conveyerised drying oven' yang pernah digunakan. Defendan pertama sebenarnya telah mengakui menerima barangan tersebut dengan menandatangani atas resit penghantaran di dalam jadual tersebut. Ia adalah jelas bahawa barangan tersebut bukannya baru tetapi pernah digunakan. Selanjutnya, barangan tersebut bukannya satu item yang tertakluk kepada pendaftaran hak milik. Deskripsi barangan tersebut di dalam

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A jadual perjanjian sewa beli tersebut adalah mencukupi untuk tujuan mengenalpasti barangan tersebut (lihat perenggan 16).

(4) Dokumen yang dikeluarkan oleh komputer yang menunjukkan jumlah yang tertunggak dan perlu dibayar tidak boleh diterima oleh kerana sijil mengikut s 90A Akta Keterangan 1950 tidak dikemukakan di mahkamah. Walau bagaimanapun mahkamah mengambil kira pengakuan perayu-perayu bahawa mereka telah berhenti membayar ansuran pada Julai 1998. Saksi responden, SP2, menjelaskan bahawa responden berhak untuk menuntut sewa beli tolak jumlah yang telah dibayar sebelum ini oleh perayu-perayu di bawah perjanjian sewa beli tersebut. Pendirian ini adalah konsisten dengan klausa 12 perjanjian sewa beli tersebut dibaca dengan klausa 11. Keterangan SP2 berkenaan jumlah RM28,891.02 juga tidak dicabar oleh perayu-perayu semasa pemeriksaan balas (lihat perenggan 19).]

D **Notes**

For cases on action to recover unpaid instalments, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3817–3822.

For cases on computer printout, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1152–1162.

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Cases referred to

ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic) [2004] 7 MLJ 30 (distd)

F *Ling Swee Lin v Public Finance Bhd & Anor* [2007] 3 CLJ 737 (distd)
Public Finance Bhd v Ehwan bin Saring [1996] 1 MLJ 331 (distd)

Legislation referred to

Evidence Act 1950 ss 90A, 101, 102, 103, 114(g)

Hire Purchase Act 1967 s 7(1)

G Sale of Goods Act 1957 s 14

Thamil Chelevan (CS Tam & Co) for the appellant.

Rosdi (JS Pillay & Mohd Haaziq) for the respondent.

H **Vernon Ong JC:**

I [1] The appellants' appeal is against the whole decision of the learned sessions court judge made on 28 April 2006 allowing the respondent's claim and dismissing the appellants' counterclaim with costs. In the court below the appellants are the first and second defendants respectively and the respondent the plaintiff. In this judgment the 'plaintiff shall mean the respondent' and

‘the first defendant’ and or ‘the second defendant’ shall mean the appellants jointly or severally, as the case may be.

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BACKGROUND FACTS

[2] Pursuant to a hire purchase agreement dated 28 April 1997 (‘the HP agreement’) entered into between the respondent and the first defendant, the respondent agreed to let and the first defendant agreed to take on hire a second-hand conveyerised drying oven (‘the goods’). In consideration thereof the first defendant agreed to pay to the plaintiff the hire purchase price of RM33,125 in 60 monthly instalments of RM553 each and a final payment of RM498.

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[3] By a guarantee of hire purchase agreement dated 28 April 1997 (‘the guarantee’), the second, third, fourth, fifth and sixth defendants jointly and severally guaranteed the due and punctual payment of all sums due and payable under the HP agreement and the due performance by the first defendant of its obligations under the HP agreement.

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THE PLAINTIFF’S CLAIM

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[4] By a legal notice dated 12 May 1998 addressed to the first defendant, the plaintiff demanded that the first defendant settle the outstanding arrears of five monthly instalments as at 9 May 1998 within seven days failing which the HP agreement would be terminated. Upon termination, the plaintiff would claim the balance of the hire purchase price together with interest amounting to RM28,725.80. By separate legal notices of the same date issued to the second, third, fourth and fifth defendants, the plaintiff gave notice of claim of the same. The defendants failed to comply with the plaintiff’s aforesaid demands. The goods were not repossessed by the plaintiff. The plaintiff’s claim against the defendants is for the sum of RM28,891.02 together with interest and costs. The computation of the said sum is set out at p 28 of the *rekod rayuan (bahagian A & B)*.

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THE APPELLANTS’ COUNTERCLAIM

[5] The appellants contend that the HP agreement is null and void because the plaintiff did not have good title to the goods. The appellants’ counterclaim against the plaintiff is for the sum of RM106,741.78 being the deposits paid under a number of other hire-purchase agreements and the sum of RM5,530 being the instalments paid under the HP agreement. In the alternative the appellants counterclaims for damages for breach of the HP agreement.

I

A THE APPELLANTS' SUBMISSION

[6] The main grounds of the appellants' appeal are as follows:

- B** (1) The respondent failed to show that it can deliver good title to the goods and failed to ensure that the first defendant will enjoy quiet possession of the goods.
- (2) The respondent is unable to identify the goods.
- C** (3) The respondent failed to prove the amount due and outstanding under the HP agreement.
- (4) All monies paid under hire purchase agreements ought to be returned to the first defendant.

D *First ground*

E [7] Learned counsel for the appellants submitted that the learned trial judge erred in holding that the Sale of Goods Act 1957 ('SOGA') did not apply to the HP agreement. According to cl 7 of the HP agreement, the implied conditions and warranties relating to title and quiet possession are not excluded and should apply. Only the implied conditions and warranties relating 'to the condition of the said goods or to their merchantability or fitness for the particular or any purpose...' are excluded. Clause 7 of the HP agreement reads as follows:

F All conditions and warranties (save and except those which are implied by the Sale of Goods (Malay States) Ordinance, 1957 and which cannot hereby be excluded by reason thereof) relating to the condition of the said Goods or to their merchantability or suitability or fitness for the particular or any purpose for which they are or may be required whether such conditions and warranties are express or

G implied and whether arising under this Agreement or under any prior agreement or otherwise are hereby expressly excluded.

H [8] Learned counsel further submitted that the implied conditions and warranties as to title and quiet possession pursuant to s 14 of the SOGA should apply. Section 14 of the SOGA is reproduced hereunder.

14 Implied undertaking as to title, etc

I In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

- (a) an implied condition on the part of the seller, that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the goods at the time when the property is to pass;

- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; A
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made. B
- [9] It is the appellants' contention that the respondent does not have good title to the goods and that the respondent will not be able to deliver good title to the first defendant. The appellants also contend that the respondent has not produced any evidence that it has good title or that it can deliver good title. In support thereof learned counsel referred to *ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic)* [2004] 7 MLJ 30; *Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331 and *Ling Swee Lin v Public Finance Bhd & Anor* [2007] 3 CLJ 737. C D
- [10] The appellants' contention that the HP agreement is subject to the implied condition as to title and warranty as to quiet possession of the goods is consistent with the provisions of cl 7 of the HP agreement. Accordingly pursuant to s 14 of the SOGA, there is an implied undertaking on the part of the respondent as to paras (a) and (b) of s 14 of the SOGA. E
- [11] The appellants also contend that: (i) the respondent did not have good title to the goods; and (ii) the first defendant did not enjoy quiet possession of the goods. It is, however, clear from the provisions of s 14 of the SOGA that the aforesaid condition and warranty are only implied. In this instance the burden of proof is upon the appellants to prove these assertions (see ss 101, 102 and 103 of the Evidence Act 1950). This the appellants have failed to do. The cases cited by the appellants can be distinguished on its facts. F G
- [12] In *ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic)*, the defendant contended that a scam was perpetrated by the plaintiff's officer, one Mr Vega, who had the defendant's properties transferred to himself for a nominal purchase price which was below the market rate in exchange for him getting the facilities approved by the plaintiff. The court held that the plaintiff owed a duty to dispel the allegations by calling Vega. As the plaintiff failed to do so the presumption under s 114(g) of the Evidence Act 1950 was invoked against the plaintiff. In that case, the defendant in question gave evidence in support of the scam whereas in this case, the appellants' assertion is unsupported. Accordingly, this case is of no aid to the appellants' contention. H I
- [13] In *Ling Swee Lin v Public Finance Bhd & Anor*, the plaintiff entered into a hire purchase agreement with the defendant for the purchase of a

- A motor vehicle. The motor vehicle was subsequently seized by the police on suspicion of being stolen property. The plaintiff thereupon terminated the hire-purchase agreement and claimed for the refund of RM86,850 paid to the defendant. The facts of this case are quite similar to that of *Public Finance Bhd v Ehwan bin Saring* where as a consequence of an intervening event, the owner was called upon to produce evidence of good title.

- [14] In *Public Finance Bhd v Ehwan bin Saring* the respondent purchased a motor car from T for RM82,000. The respondent paid RM57,000 out of which RM40,517.97 was paid to T, and RM16,482.03 to the appellant. For the balance of RM25,000, the respondent (as hirer) entered into a hire purchase agreement with the appellants (as owners) whereby that sum was advanced by the appellants to the respondent to pay T the balance of the purchase price. Six weeks after the hire-purchase agreement was executed the motor car was seized by the Customs and Excise Department for an alleged offence. The respondent contended that by reason of the seizure, the appellants had breached the implied warranties and conditions provided for under s 7(1) of the Hire Purchase Act 1967 and that there had been a total failure of consideration. The appellants, however, contended that there was no breach as the implied condition that the owner should have a right to sell the goods at the time when the property was to pass only arose when the last instalment had been paid. The court held that the implied condition of good title applied when the owner entered into the hire purchase agreement, and not when the final payment was made. On the facts in this cited case, there was an intervening event by the Customs and Excise Department which prevented the owner from passing good title of the motor car. In this appeal, however, there was no intervening event involving a third party which occurred which made it impossible for the respondent to pass a good title of the goods to the appellants. In the absence of any intervening event, it is not open to the appellants to contend that the burden of proof is upon the respondent to prove the condition and warranty, which is already implied by the SOGA.

- [15] The appellants' contention that they have always contended that the respondent did not have good title to the goods both at the time when the HP agreement was entered into at any time thereafter is unsubstantiated. The so-called discovery by the first defendant of this fact during an audit carried out in early 1998 was not communicated to the respondent at all. There was no evidence of any written communication from the appellants to the respondent notifying of this alleged discovery. There was no written rebuttal by the appellants even after the respondent's notices of demand to all the defendants (exh P12) were issued. The appellants also attribute this discovery as a reason for the first defendant to stop paying the instalments. This issue was only pleaded after the summons was filed against the appellants.

Accordingly, I hold that this contention is unsubstantiated and without merit. A

Second ground

[16] The appellants also contended that as the respondent have not been able to identify the goods, they are unable to pass good title to the goods. This contention is premised on the fact that the schedule to the HP agreement did not contain the details of the dealer's invoice or any serial or registration numbers and model or make of the goods. Upon an examination of the HP agreement in question, it is clear that the goods is described in the schedule as follows: B C

PARTICULARS OF GOODS:

Description: Conveyerised Drying Oven	D
New/Secondhand: Secondhand	
Fixture/Moveable:.....	
Model/Make:.....	
Serial/Registration No.:Conveyerised Drying Oven	E
Engine No:.....	
Chasis No:.....	
Accessories:.....	F

[17] Therefore, according to the schedule, the goods in question is a second-hand conveyerised drying oven. The first defendant has in fact acknowledged receipt of delivery of the goods by signing on the delivery receipt in the schedule on the following terms: G

DELIVERY RECEIPT

To:

Mayban Finance Berhad	Description of Goods.....	H
No 1, Medan Tuanku Satu,		
50300 Kuala Lumpur.	Reg /Serial No.....	

I/We acknowledge that I/we have read/been given an explanation of Hire Purchase Agreement made between us and fully understand the terms and conditions thereof before signing it. I/We confirm that I/we have examined the Goods described in the Agreement and that the same is/are in good order and condition, and to my/our satisfaction in every respect, and that I/we have taken delivery of the Goods at this date. I

- A *I/We hereby further acknowledge and confirm that prior to or at the time of signing the Agreement I/we have not made known to you expressly or by implication any particular purpose for which the Goods are required.

OR

- B *I/We hereby further acknowledge and confirm that the Goods are second-hand and the provisions of Clauses 6(2) and 7 were brought to my/our notice to the signing of this Agreement.

(*Delete whichever is not applicable)

Signature of Hirer

- C Date.....

.....tt.....

- D [18] It is important to bear in mind that the goods in question is not new but second hand. Furthermore, the goods is not an item subject to any system of registration of title. In my view, the description of the goods in the schedule to the HP agreement is sufficient for the purposes of identifying the goods. The first defendant's signature on the delivery receipt in acknowledgement and confirmation of delivery of the goods contradicts the appellants' contention. Further, learned counsel for the appellants have not furnished any authorities in support of this contention. Accordingly, I find that this contention is also without merit.

Third ground

- F [19] The appellants contend that the respondent have failed to prove the amount due and outstanding under the HP agreement. According to the *rekod pembayaran akaun* (exh P9), the final instalment is due on 28 April 2002. The appellants contend that P9 is a computer generated document. It is inadmissible because the certificate pursuant to s 90A of the Evidence Act 1950 was not tendered to the court. The notes of evidence revealed that no such certificate was tendered. Accordingly, I hold that P9 is inadmissible and cannot be relied on in support of the respondent's claim.

- H [20] Be that as it may, I have also noted the appellants' admission that they have stopped paying the instalments in July 1998. The respondent's witness SP2 explained that the respondent is entitled to claim for the hire purchase price less the sums previously paid by the appellants under the HP agreement. This position is consistent with cl 12 of the HP agreement read together with cl 11. SP2's evidence on the amount of RM28,891.02 was also not challenged by the appellants in cross-examination. I therefore accept the learned trial judge finding on this issue. In the premises I find that the appellants' contention is devoid of merit.

Fourth ground

[21] The appellants counterclaim for the refund of RM106,741.78 being the deposits paid under the HP agreement and other different hire purchase agreements and RM5,530 being the instalments paid under the HP agreement. The appellants contend that the HP agreement and the other hire purchase agreements are null and void for total failure of consideration. For the reasons adverted to above, I find that the appellants' contention is without merit. The HP agreement is a valid agreement. The appellants' counterclaim is without any basis in law and in fact.

[22] According to the appellants' witness SD1, the deposit amounting to RM106,741.78 was made by Perusahaan Peridi Sdn Bhd in which he was also a director. The learned trial judge found that on a balance of probabilities the appellants failed to prove that the said sum was paid in this case. I see no good reason to interfere with the learned trial judge's finding.

[23] For the reasons adumbrated above, the appellants' appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Sally Kee

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